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No. 90-1691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE ALTON & SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

ROGER GRIMMING,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT

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QUESTIONS PRESENTED

1. Whether the federal question sought to be reviewed was timely or properly raised and expressly passed on by the Illinois Appellate Court.

2. Whether the judgment rests on an adequate non-federal basis.

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TABLE OF AUTHORITIES

None

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STATEMENT OF THE CASE

Respondent feels compelled to set forth certain additional items of evidence omitted by petitioner.

Dr. Mark Lichtenfeld was hired by petitioner on September 26, 1984, to conduct a fitness for duty examination on Roger Grimming (R. 213) and to thereafter report his findings and conclusions to petitioner (R. 214). It was this very report, prepared at petitioner's request, which permitted respondent his last return to work prior to this injury.

The doctor was called by Mr. Grimming and on direct examination explained his examination and conclusions in detail. He

repeatedly stated that his examination was completely normal, and that Mr. Grimming was totally free of symptoms. (R. 217-221) He indicated all of his findings were consistent with a "healed back" (R. 220).

A sampling of his conclusions, on direct examination, follows:

> . . . (H)e was fully recovered from his injury. I have never seen anyone with a back problem, with a disc problem or a nerve problem that could perform full range of motion in all directions without any pain. (R. 219).
>
> He appeared to be fully recovered without any residual problems from the injury that he suffered several years earlier. (R. 221).
>
> I felt he was able to return to full duty at Alton & Southern. In fact, he could return at any facility with unlimited activity in any capacity. (R. 222).

The Federal Questions Was Not Timely or Properly Raised and Was Not Expressly Passed On

Petitioner did not assert its Federal claim at every level of the Illinois Court System. Instead, the assertion was first made to the Illinois Appellate Court, Fifth District.

Petitioner did not advance this argument in either the instruction conference or in its post-trial motion. In the instruction conference, petitioner's counsel's only objection was that plaintiff's Instruction No. 23 was a non-I.P.I. instruction and argumentative. (R. 800-801). At no time did counsel for petitioner suggest that recovery for aggravation of a preexisting condition was barred by the Federal Employer's Liability Act, nor did he argue that the instruction was inconsistent with the Federal Employer's Liability Act.

Petitioner's post-trial motion likewise omitted any reference to this argument, but instead repeated the objection that the instruction was argumentative and over emphasized an element of damage, and was therefore "misleading, confusing and unfairly highlighted plaintiff's arguments". (C. 675-676).

REASONS FOR DENYING THE WRIT

1. The Federal question sought to be reviewed was not timely or properly raised and was not expressly passed on.

Simply stated, petitioner was waived any claim that respondent's Instruction No. 23 is somehow inconsistent with the Federal Employer's Liability Act, and this issue was never presented to nor passed upon by the trial court. Moreover, there was more than ample evidence in the record to support a jury's conclusion that respondent had recovered from the effects of any preexisting injury prior to the accident in question.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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